

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

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| DEREK KHANNA, individually and derivatively on behalf of Shimbly Corporation, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | Case No. 21-cv-5752 |
| |) | |
| |) | Hon. Judge Virginia M. Kendall |
| KATELYNN BANKS, et al., |) | Magistrate Judge Keri Holleb-Hotaling |
| |) | |
| Defendants. |) | JURY TRIAL DEMANDED |
| |) | |
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PLAINTIFF’S MOTION TO DISMISS
FIRST AMENDED COUNTERCLAIMS OF PAMELA CARY AND RICHARD CARY

Pursuant to Fed. R. Civ. P. 12(b), Fed. R. Civ. P. 9(b), 15 U.S.C. § 78u-4(b)(1) and (2), and other governing law, Plaintiff Derek Khanna, individually and derivatively on behalf of Shimbly Corporation (“Plaintiff”), hereby files his Motion to Dismiss First Amended Counterclaims of Defendants Pamela Cary and Richard Cary (collectively, the “Cary Defendants”) (this “Motion to Dismiss”). In support of this Motion to Dismiss, Plaintiff states as follows:

1. This Motion to Dismiss is based on Plaintiff’s Memorandum of Law in Support of the Motion to Dismiss (“Memorandum of Law”), which is filed contemporaneously herewith and incorporated by reference herein.

2. As discussed in Plaintiff’s Memorandum of Law, the Court should dismiss all of the First Amended Counterclaims (“Amended Counterclaims”) asserted by the Cary Defendants – Count I for “Securities Fraud,” Count II for “Common Law Fraud,” and Count III for “Fraudulent Concealment.” Despite the Cary Defendants’ efforts to cure the deficiencies in their prior pleading, the Amended Counterclaims still fail to satisfy governing pleading standards, as applied

by the Seventh Circuit and this Court, applicable to the Cary Defendants' securities-law counterclaim (Count I) and common-law counterclaims (Counts II and III). Dismissal, therefore, is necessary. Moreover, the Court should dismiss with prejudice, given the Cary Defendants' failures to cure the deficiencies in their initial pleading, and the fact that they have pled themselves out of this Court with allegations that defeat their Amended Counterclaims.

3. To summarize, the Cary Defendants fail to allege any alleged fraudulent statements or omissions, let alone such statements or omissions with the heightened particularity applicable to securities-fraud claims. The Cary Defendants rely on a "pitch deck," which they received from Defendant Banks (not Plaintiff), and which contained alleged statements that are not actionable on their face. In fact, the Cary Defendants received the "pitch deck" while fully aware (by their own admissions) that Shimbly was in development, and that the "pitch deck" focused on prospective functionality (not promised existing functionality). The Cary Defendants also include allegations that contradict any argument that Plaintiff made any allegedly false statements in the "pitch deck." In addition, the Cary Defendants also fail to allege any other actionable fraudulent statements, including alleged and unspecified statements regarding Plaintiff's "credentials." Nor can the Cary Defendants rely on any alleged failure to disclose a "romantic relationship" between Plaintiff and Defendant Banks, given the absence of any cognizable duty to disclose that alleged fact.

4. The Cary Defendants' Amended Counterclaims suffer from additional independent dispositive defects. For example, the Cary Defendants' Amended Counterclaims include no or insufficient allegations of: (a) the requisite scienter under securities law and/or intent under common law; (b) materiality under securities law and/or reasonable reliance under common law; (c) loss causation under securities law and/or causation under common law.

WHEREFORE, for the reasons set forth in Plaintiff's Memorandum of Law, Plaintiff respectfully requests that this Honorable Court enter an order: (a) granting Plaintiff's Motion to Dismiss; (b) dismissing each and all of the Cary Defendant' Amended Counterclaims, with prejudice; and (c) granting such further relief that this Court deems just and proper.

Dated: April 11, 2024

Respectfully submitted,

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/s/ Hillard M. Sterling

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